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Supreme Court of the United States

October Term 1951

No. 455

HANS KROCH, ET AL., *Petitioners*

v.

J. HOWARD MCGRATH, as Attorney General of the United States, and GEORGIA NEESE CLARK, as Treasurer of the United States.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
Decisions Below	1
Jurisdiction	3
Summary Statement of Facts	3
Question Presented	4
Statutes Involved	4
Reasons for Granting Writ	5
A) Questions of General Importance	5
B) Failure to give proper effect to applicable decisions	11
1. Markham v. Cabell	11
2. United States v. Congress of Industrial Organizations	12
3. United States v. Katz	15
C) Conclusion	17

Table of Publications

Hearings Before Congressional Committees of the House:

Committee on Interstate and Foreign Commerce, 80th Congress, 1st Session, on H. R. 873, 1823, 1000, and 2823 15

Reports of the Committees of the House of Representatives:

No. 2398, 79th Congress, 2nd Session 13
No. 1843, 80th Congress, 2nd Session 13, 14

Reports of Committees of the Senate:

No. 1839, 79th Congress, 2nd Session 13
No. 1532, 80th Congress, 2nd Session 13

PAGE

Reports of the Office of Alien Property

Annual Report for the fiscal year ending June 30, 1945 9
Annual Report for the fiscal year ending June 1947.... 9

Table of Cases

Matter of Albrecht Behrens, OAP claim 45796, Docket No. 688 9
Central v. Garvan, 254 U.S. 554, 65 L. ed. 403, 41 Sup. Ct. 214 8
Haggar v. Helvering, 308 U.S. 389, 84 L. ed. 340, 60 Sup. Ct. 337 16
Matter of Erich Lachmann (Sept. 1949) OAP claim No. 1199, Docket No. 132 9
Lawson v. Sunanee, 336 U.S. 198, 93 L. ed. 611, 69 Sup. Ct. 503 16
McGrath v. Manufacturers Trust Co., 338 U.S. 241 (247 note 8), 94 L. ed. ..., 70 Sup. Ct. 4 8
Markham v. Cabell, 326 U.S. 404, 90 L. ed. 165, 66 Sup. Ct. 193 ..... 11, 14
Posadas v. National City Bank, 296 U.S. 497, 80 L. ed. 351, 56 Sup. Ct. 349 12
Shapiro v. United States, 335 U.S. 1, 92 L. ed. 1787, 68 Sup. Ct. 337 16
Stoehr v. Wallace, 255 U.S. 239, 65 L. ed. 604, 41 Sup. Ct. 293 8
Uebersee Finanz Korp. v. Clark, 81 App. D.C. 284, 158 F. (2) 313, aff'd Clark v. Uebersee 332 U.S. 480, 92 L. ed. 88, 68 Sup. Ct. 174 15
United States v. Chase Security, 277 U.S. 600, 72 L. ed. 1008, 48 Sup. Ct. 561 16
United States v. CIO, 355 U.S. 106, 92 L. ed. 1849, 68 Sup. Ct. 513 12
United States v. Katz, 271 U.S. 354, 70 L. ed. 986, 46 Sup. Ct. 513 15
United States v. Raynor, 302 U.S. 540, 82 L. ed. 413, 58 Sup. Ct. 353 16
Vermilya-Brown v. Connell, 355 U.S. 377, 92 L. ed. 1139, 69 Sup. Ct. 140 16

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DECISIONS BELOW

The opinion of the District Court (21 A, R—) is not as yet reported. The opinion of the United States Court of Appeals was rendered on October 5, 1951, and reads as follows:

> "PER CURIAM: The judgment of the District Court is affirmed. *Pass* v. *McGrath*, decided today."

The decision in the case of *Pass* v. *McGrath* is not yet reported and reads as follows:

PER CURIAM: Appellant sued under §9a of the Trading with the Enemy Act, as amended, 42 Stat. 1511, 50 U. S. C. App. §9(a), to recover property vested in the Custodian, pursuant to §5(b) of the Act, as belonging to a national and resident of Germany. The complaint alleges that appellant is a native-born citizen of the United States; that he owns the property; that in 1943, when the Custodian took it, he was unavoidably living in Germany; that he returned to the United States in August, 1946 and filed a notice of claim with the Custodian in September, 1946. The complaint was filed in October, 1949. The District Court dismissed it as barred by §33 of the Trading with the Enemy Act, as amended, 62 Stat. 1218, 50 U. S. C. App., Supp. III, §33.

Section 33 provides ". . . No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the . . . vesting in the Alien Property Custodian . . . of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof." Since no suit and no claim was pending within two years after the property vested in the Custodian, the "later" date and the last on which suit could be brought was April 30, 1949. The claim filed with the Custodian in September, 1946 could not toll the two-year period that had expired in 1945. In our opinion there is no merit in appellant's contentions that the statute does not mean what it says and that if it does it is unconstitutional. It is "well established that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel*, 282 U. S. 656, 659. "And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations. *Lynch* v. *United States*, 292 U. S. 571, 581-582, and cases cited." *Maricopa County* v. *Valley Nat'l Bank of Phoenix*, 318 U. S. 357, 362.

JURISDICTION

Jurisdiction of the United States Supreme Court is based on 28 USCA Sec. 1254.

SUMMARY STATEMENT OF FACTS

On May 11, 1949, relying on Sec. 9(a) of the Trading with the Enemy Act (50 USCA, App. Sec. 9(a)), petitioners brought suit in District Court for the return of property vested by the Alien Property Custodian, alleging to be neither enemies nor allies of enemies. (As amended. 2A, R-1). Respondents filed motion for summary judgment (3A), which admitted that Notice of Claim had been filed in time, but contended that such filing did not toll the running of the statute of limitations. This motion was granted (22A) overruling petitioners' contention that the statute was tolled by timely filing of claims The United States Court of Appeals affirmed this decision.

Petitioner Hans Kroch was a German-Jewish owner of a bank in Germany when he was persecuted and deprived of the assets of his bank by the Nazis. After his release from concentration camp in 1939, and having become stateless, he fled first to Holland and thence to Argentina where he took up, and still retains, his domicile. The other petitioners, all members of his family and equally persecuted, allege to have an interest, being loan share holders in Petitioner Hans Kroch's Bank. None of the petitioners are enemies or allies of enemies.

Petitioners' bank was owner of 4500 shares of nom. $100.00 each preferred stock in an American corporation, to wit the International Mortgage and Investment Corporation. Effective as of December 28, 1942, the Alien Property Custodian vested 80.49% of the preferred stock

(12,074 shares) in said company, and effective as of February 26, 1947, another 92 such shares were vested.

Notices of Claim were filed with the Office of Alien Property on June 2, 1942, April 15. 1947, and August 29, 1947.

QUESTION PRESENTED

Does the tolling proviso of the last sentence of Section 33 of the Trading With the Enemy Act take effect after timely filing of Notice of Claim if such claim is filed under the alternate period of limitation (before April 30, 1949), or has Congress by the amendment of July 1, 1948 impliedly repealed the tolling proviso for the alternate filing period?

STATUTES INVOLVED

Section 9(a) of the Trading with the Enemy Act (50 USCA App. Sec. 9(a)) authorizes suit for return of vested property by persons not enemies or allies of enemies.

Section 33, containing the tolling proviso, originally read as follows:

> "Sec. 33. No return may be made pursuant to section 9 (a) or 32 (a) unless notice of claim for return has been filed within *two years from the seizure* by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which the claim is made or within *two years from the date of enactment* of this section, whichever is later. No suit pursuant to section 9(a) may be instituted after the expiration of two years from the date of seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought or from the date of enactment of this section, whichever is later, *but in computing such two years there shall*

be excluded any period during which there was pending a suit or claim for return pursuant to section 9(a) or 32 hereof." (Italics supplied.)

Section 33, as amended, reads as follows:

"No return may be made pursuant to section 9 or 32 (section 9 or 32 of this appendix) unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States on or after December 18, 1941, *by April 30, 1949, or two years from the vesting* of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 (section 9 of this appendix) may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, *but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.*" (Italics supplied).

REASONS FOR GRANTING WRIT

A.

Questions of General Importance.

When first enacted on August 8, 1946,[1] Sec. 33 of the Trading with the Enemy Act established two alternate periods for both filing claims and suits, to wit: two years from vesting, or two years from the enactment of Sec. 33, whichever is later. The tolling provision read as follows:

". . . But in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to Sec. 9(a) or 32 hereof."

[1] 60 Stat. 925.

On July 1, 1948,[18] Congress changed the alternate period, substituting a date certain (April 30, 1949) for "two years from the enactment of this section", thereby extending the alternate period by 7 months and 23 days. But Congress did not change the tolling provision, according to which "in computing such two years" the time during which a claim is pending shall not be counted".

This statute, as now constituted, creates considerable doubt. Originally, *every* Notice of Claim if filed timely and properly, tolled the running of the statute for filing suit. Now, one of the two alternate periods of two years having been extended to more than two years, it is unclear whether tolling by filing of a claim would only take place if such claim be filed within the first period (two years from vesting), or whether it takes place also if the Notice of Claim was filed within the alternate period (up to April 30, 1949), the alternate period no longer being a two-year period.

The United States Court of Appeals for the District of Columbia Circuit by its decision below, has adopted the latter interpretation.

Thus, the court below construed a federal statute. Petitioners respectfully submit that there exist three reasons why the question at issue is of general importance so that the United States Supreme Court should decide it, there being no decision of this Court directly in point:

(1) Most assets were vested during the first years of the Second World War. In regard to them, the first period (two years from vesting) expired prior to the cessation of hostilities, therefore prior to the time when divestees who were living in enemy, enemy-occupied, or otherwise cut-off countries, could obtain knowledge of vesting or could use re-opened regular lines of com-

[18] 62 Stat. 1218.

munication to file Notices of Claim. It follows that most claims were filed during the second, alternate period (until April 30, 1949). As the Department of Justice said in a letter directed to the Speaker of the House:[2]

> ". . . It now appears that the 2 years allowed for the filing of claims has proved insufficient in the case of many claimants. Until recently, many of the occupied countries have been in a disorganized condition in which communication has been restricted and it has been difficult if not impossible for claimants resident in such countries to file claims. Moreover, many potential claimants have been necessarily preoccupied with the problems of day-to-day existence. The plight of the victims of persecution has been even more arduous. Most of them are presently either in displaced-person camps or dead. Many are presumably unaware of their privileges under the act and, despite the earnest efforts of this Department, will probably continue to be so for some time in the future. Only a very small number of such persons have thus far been able to file claims. The heirs of deceased victims of persecution (who also may file claims under sec. 32), some of whom are American citizens, are in many cases ignorant of the existence of the vested property, or of the fact that they are the heirs, or both. Unless the statute of limitations is extended, the purpose of Congress will be frustrated in many deserving cases. . . ."

If filing of claims did not toll the running of the statute, then all these thousands of claimants, claiming as non-enemies, are barred from suit, unless they got tired of waiting for an administrative decision by April 30, 1949.

It follows that the access of all these thousands of claimants to the courts will depend upon the decision in this case.

(2) Normally, in common-law as well as in civil-law jurisdictions, exhaustion of administrative remedies is

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[2] Appended to Annex III.